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III

Properly Speaking, Only Celestial Bodies Have Been Reserved for Use Exclusively for Peaceful (Non-Military) Purposes, but Not Outer Void Space

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Till Cant cease, nothing else can begin.
—Thomas Carlyle

ON OCTOBER 4, 1957, FOR THE FIRST TIME IN HUMAN HISTORY, man succeeded in sending an object into outer space. The world was electrified. There was an overwhelming yearning that the whole of outer space, including all the celestial bodies, should be reserved for exploration and use for peaceful purposes only—in other words, completely demilitarised as Antarctica was being demilitarised in 1959 in the Antarctic Treaty.[1] Almost immediately, the General Assembly of the United Nations, in Resolution 1148 (XII), adopted on the 14th of the following month,[2] urged all the States concerned, particularly those in the Sub-Committee of the Disarmament Commission that were negotiating an agreement on reduction, limitation and open inspection of armament and armed forces, to give priority to reach a disarmament agreement which, upon its entry into force, will provide for the following:

> . . . .
> (f) the joint study of an inspection system designed to ensure that the sending of objects through outer space shall be exclusively for peaceful and scientific purposes;
> . . . .

A year later, on December 13, 1958, the General Assembly, in another resolution,[3] reiterated "the common interest of mankind in outer space and . . . that it is the common aim that outer space should be used for peaceful purposes only." However, it was clear at the same time that the prime motive and incentive of the "space" Powers in reaching outer space were obviously military.

The diplomats of the Soviet Union and of the United States, at the time the only countries with space capability, consequently were faced with the seemingly impossible task of how not to appear to defy an almost universal desire for the exclusively peaceful uses of outer space, while preserving their countries' need to explore and exploit all the military potentials of outer space. For the Soviet Union, with its closed society and authoritarian regime, it was relatively simple. It had only to lie about its military activities, by either denying their existence or labelling them as scientific (as it in fact did, for example, for a considerable time with its own reconnaissance satellites), while denouncing the U.S. ones as unlawful. For the United States, there obviously would be practical difficulties in following such a course. However, its diplomats, assisted, no doubt ably, by highly effective lawyers, also succeeded in minimal time in squaring the circle by simply re-inventing the word "peaceful" and changing its meaning from "non-military," to "non-aggressive."[4]

It thus became possible to create a highly misleading impression that all were agreed that the whole of outer space was to be used exclusively for peaceful purposes, while the space Powers carried on with their military ambitions in outer space. This impression was somehow carried over into the 1967 Space Treaty,[5] the first and the most important treaty relating to outer space concluded under the auspices of the United Nations, and one intended to establish the international legal framework for man's exploration and use of outer space.[6] Since, by its nature and because of the wide acceptance of most, if not necessarily all, of the provisions of the Space Treaty as rules of general international law by contracting and non-contracting parties to the Treaty alike, the myth has also grown up that outer space, including the moon and other celestial bodies, has been reserved for exploration and use for exclusively peaceful purposes only, not only under the Space Treaty but also under general international law. The present paper is a re-examination of the 1967 Space Treaty,

and in particular its Article IV, in order to clarify their impact on the military use of outer space.

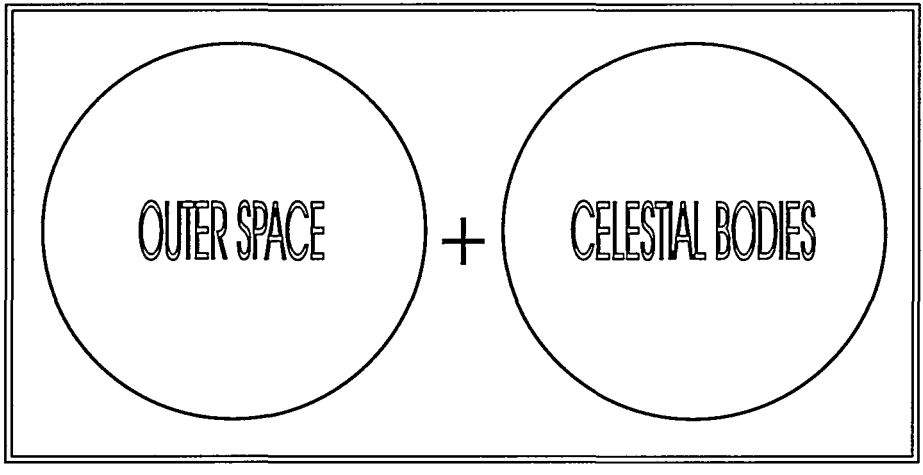
Clarification of the Terms "Outer Space" and "Outer Void Space"

First of all, it may be necessary to clarify the meaning of the term "outer space" and to introduce the term "outer void space." Up to and including the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space in General Assembly Resolution 1962, adopted on December 13, 1963,[7] the United Nations, including its Committee on the Peaceful Uses of Outer Space (COPUOS), where international space law was constantly being discussed with a view to its progressive development, always referred to outer space separately from celestial bodies. For instance, Article 3 of the Declaration provides:

> "Outer space *and* celestial bodies are not subject to national appropriation. . . ." (emphasis added).

According to this terminology, extraterrestrial space consists, therefore, of "outer space" and "celestial bodies." Celestial bodies are thus treated as a category apart from outer space as such, as illustrated in figure 1. However, since the 1967 Space Treaty, which in other respects follows the 1963 Declaration closely in form and in substance, the United Nations always speaks of "outer

Figure 1: Meaning of "Outer Space" Up to the 1963 Resolution

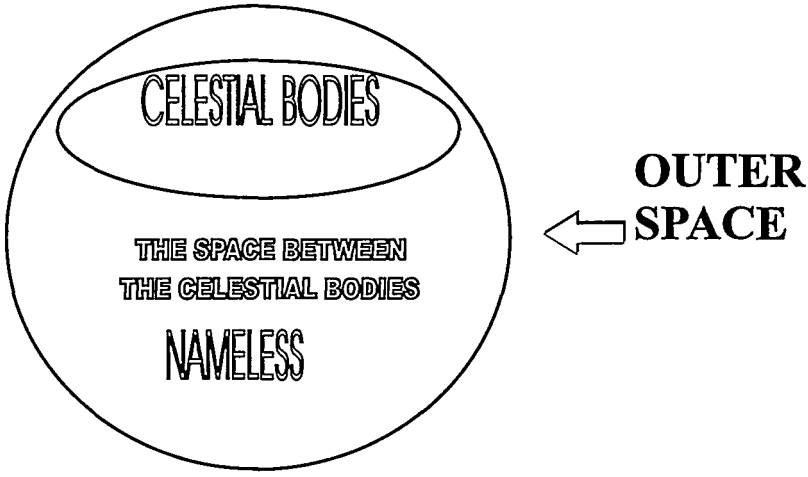


space, including the moon and other celestial bodies" in treaties and other instruments relating to outer space which it has sponsored. Thus, the 1967 Space Treaty, in its Article II, which is equivalent to the above-quoted Article 3 of the 1963 Declaration, provides:

> "Outer space, *including* the moon and other celestial bodies, is not subject to national appropriation. . . ." (emphasis added).

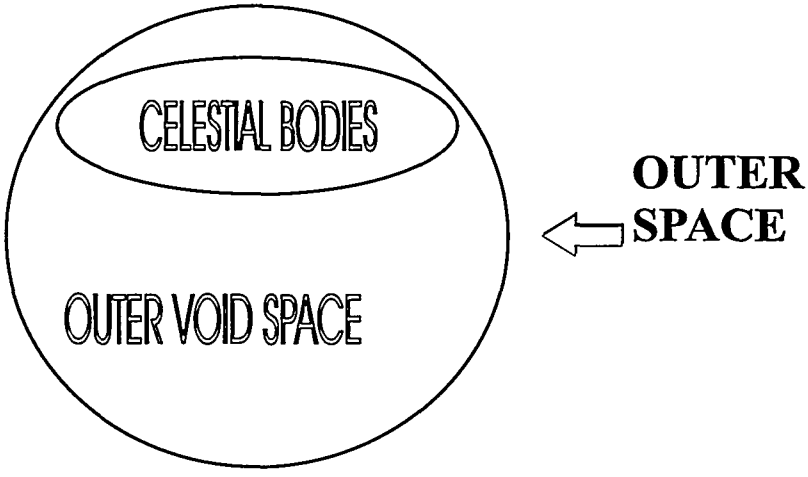
In other words, henceforth the moon and other celestial bodies were no longer treated as being separate from outer space as such, but rather as forming part of it, as shown in figure 2. It follows that whenever reference is made to "outer

Figure 2: Meaning of "Outer Space" since the 1967 Space Treaty, Which, by Including Celestial Bodies Within It, Deprives the Space Outside Celestial Bodies, Previously Known as Outer Space, of a Name of Its Own



space," the moon and all the other celestial bodies are automatically included. One of the consequences of this change in the use of the term outer space is that the vast space in between all the celestial bodies has lost any specific designation. It has become nameless, causing a great deal of confusion and misunderstanding. What I have done is to name it the "outer void space,"[8] as can be seen in figure 3, hoping thereby to clarify the nomenclature of the different parts of outer space before we embark on the meaning of the word "peaceful."

Figure 3: Need to Introduce the Term "Outer Void Space"



The Meaning of "Peaceful": A Legal *Trompe-L'Oeil*

In 1604, Sir Henry Wotton, one of King James I's ambassadors, while on his way from England to Venice to take up his post, wrote in the album of his friend Christopher Fleckamore at Augsburg:

> *"Legatus est vir bonus peregre missus ad mentiendum reipublicae causa."*

Translated into English, it means:

> "An ambassador is an honest man, sent to lie abroad for the good of his country."

One sometimes wonders whether, especially since power politics in disguise took over from open power politics after World War II,[9] some international lawyers, spurred on perhaps at one time by the Cold War, when advising or assisting their diplomatic colleagues in international discussions or negotiations, or even in their own approach to the subject, have not consciously or unconsciously allowed their calling to be abused in order to help create an illusion, presumably for our benefit, that we are now all living in some brave and cozy New World Order, free from all the restraints of the past.

Nowhere is this more clearly shown than the attempt to transfigure "peaceful" from meaning "non-military" to meaning "non-aggressive," which appears to have started with international space law.[10] We need to go back no further

than the fifties to find the original meaning of the word, when Atoms for Peace was then the world's most fashionable preoccupation. International agreements for assistance and co-operation in the *peaceful* uses of nuclear energy proliferated.[11] Peace then definitely meant non-military. Imagine someone, at that time or even now, trying to justify the diversion of nuclear fuel and technology supplied under such agreements to making what one would like to describe as a peaceful and non-aggressive nuclear bomb to be used only when threatened! Even in 1959, the Antarctic Treaty in its Article I made it crystal clear that "peaceful" meant "non-military."[12]

Yet, only three years and two days after the signing of the Antarctic Treaty on December 1, 1959, which was, after all, done in Washington, Senator Albert Gore, Sr., representing the United States, stated on December 3, 1962, before the First Committee of the United Nations in New York that:

> It is the view of the United States that outer space should be used only for peaceful—that is, non-aggressive and beneficial—purposes. The question of military activities in space cannot be divorced from the question of military activities on earth. To banish these activities in both environments we must continue our efforts for general and complete disarmament with adequate safeguards. Until this is achieved, the test of any space activities must not be whether it is military or non-military, but whether or not it is consistent with the United Nations Charter and other obligations of law.[13]

It is clear that the United States was at this point trying hard to attribute an entirely new meaning to the word "peaceful." This piece of semantic and legal acrobatics was obviously a bold attempt to bypass and circumvent the then still prevalent attitude that all military activities should be banned from outer space, while seemingly accepting it, thus reaping the benefit, as the saying goes, of having the cake and eating it too. Apart from the two General Assembly resolutions quoted at the beginning of this chapter, another example of this common attitude at the time was a statement by the Indian delegate to COPUOS earlier the same year, when he declaimed:

> My delegation cannot contemplate any prospect other than that outer space should be a kind of warless world, where all military concepts of this earth should be totally inapplicable. . . . There should be only one governing concept, that of humanity and the sovereignty of mankind.[14]

However, this highly emotive, understandable and popular desire was unrealistic for at least two reasons. First, the motive and incentive of the space

Powers in pouring astronomical amounts of money into the space programmes were first and foremost military, and from that point of view their expectations were amply vindicated in no time.[15] Thus, although the launching of Sputnik I in 1957 was part of the scientific International Geophysical Year programme,[16] there is little doubt as to the effect Sputnik I was perceived to have on the world's balance of military power. Whilst, until Sputnik I, the Soviet delegate sat alone with delegates of four Western Powers in the five-Power Disarmament Sub-Committee of the Conference of Foreign Ministers, two years after Sputnik I it was decided to replace this Sub-Committee with a ten-Power Disarmament Committee consisting of five NATO States and five Warsaw Pact States—in other words, parity instead of being outnumbered one to four![17] After all, if a State can put several tons of hardware into earth orbit, it is demonstrably capable of sending missiles with nuclear warheads practically anywhere in the world, without the need of foreign military bases or an extensive navy. To expect the space Powers or near-space Powers, after acquiring or about to acquire space capability, to abandon the use of outer space for military purposes was wholly unrealistic.

Secondly, as Senator Gore quite rightly pointed out, disarmament in outer space cannot take place in isolation from the problem of disarmament on earth. The Soviet Union took the same line, and for a long time declined to discuss the control of the military use of outer space in COPUOS, maintaining that it fell within the jurisdiction of the Disarmament Commission.[18] Thus in the negotiations of the 1967 Space Treaty, attempts by some delegations to bring about a complete demilitarisation of outer space were clearly rejected by both superpowers.[19]

The problem for the superpowers was how, from the standpoint of public relations, not merely to not appear to flatly reject the emotive demand that was sweeping the world for an outer space devoted exclusively to peaceful uses, but also to appear as if to endorse it, while, from the legal point of view, fully maintaining their rights to use outer space for military purposes. As mentioned before, the two superpowers each developed their own way of accomplishing the seemingly impossible. For the Soviet Union, with its closed society, totalitarian regime, and strict control over the media, the solution was relatively simple.[20] It had in fact jumped on the peace bandwagon. It even submitted a proposal in the United Nations to prohibit the use of outer space for military purposes.[21] All it had to do, as it was wont to, was pretend that all its military space missions were for scientific, and therefore solely peaceful, purposes, while of course resisting all suggestions of verification. Thus, in the beginning, it pretended that it did not use satellites for military reconnaissance and maintained that it was illegal to "spy" from outer space, while of course it was doing so all the time.[22] For the United States, while one cannot rule out that it might have

resorted to such methods on occasions, to sustain such a course on a long-term basis would have been difficult. Here is where its diplomats, advised no doubt by their ingenious legal colleagues, started, as we have seen, to re-invent the word "peaceful," turning its meaning from "non-military" to "non-aggressive" so that all its military space missions, not being aggressive, would also be for peaceful purposes. In so doing, an illusion was created by both space Powers that outer space has in fact been kept exclusively for peaceful uses. Mission impossible was accomplished.

Our task here is primarily to re-examine the effects of the 1967 Space Treaty,[23] in particular Article IV, on the military use of outer space as well as the impact, if any, which this masterpiece of legal *trompe-l'oeil* has had on the Treaty.[24]

Background to Article IV of the 1967 Space Treaty

The 1967 Treaty represents a compromise reached by the then two superpowers during a thaw in their relations after Nikita Khrushchev came to power in the Soviet Union, and especially following the inauguration of John Kennedy as President of the United States;[25] the thaw continued during the presidency of Lyndon Johnson. The first real breakthrough on the disarmament front was the signing of the Partial Test Ban Treaty on August 5, 1963.[26] It will be recalled that the contracting States "undertake to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion . . . in the atmosphere; beyond its limits, *including outer space*."[27] The Treaty was not only the first multilateral agreement with a specific reference to outer space, it also related to disarmament. This move was accompanied by announcements from both the U.S. and the USSR the same year that they would not station any objects carrying nuclear weapons or other weapons of mass destruction in outer space. These superpower expressions of intentions were welcomed by the UN General Assembly, which adopted Resolution 1884 (XVIII) on October 17, 1963, calling on all States:

> to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner.

Article IV(1) of the 1967 Space Treaty adopted the wording from Resolution 1884 almost verbatim. In other words, by then, agreements had already been reached between the Soviet Union and the United States on the subject.[28] Article IV(1) provides:

> States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

Before proceeding further to examine the meaning and effect of Article IV, let us examine those of the remaining provisions in the 1967 Space Treaty which might have an effect on the military use of outer space.

Provisions Other Than Article IV

The Preamble. If we consider the 1967 Treaty carefully, and exclude Article IV, we find that only the Preamble contains references to both peaceful purposes and weapons. The Preamble has often been cited as evidence that outer space can only be used for "peaceful purposes." However, if we look at the Preamble with care, we find this view difficult to sustain.

The Preamble begins with the opening paragraph: "The States Parties to this Treaty," and ends with the paragraph: "Have agreed on the following." The relevant passages in the Preamble relating to peaceful use are the third, fifth, and eighth paragraphs. They are respectively as follows:

> Recognising the common interest of all mankind in the progress of the exploration and use of outer space *for peaceful purposes*,
>
> . . . .
>
> Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,
>
> . . . .
>
> Recalling Resolution 1884 (XVIII), calling upon States to refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction or from installing such weapons on celestial bodies, which was adopted unanimously by the United Nations General Assembly on 17 October 1963,
>
> . . . .[29]

A close look at paragraphs 3 and 5 of the Preamble will show that the contracting Parties "recognise" that mankind is interested in the "progress of the exploration and use of outer space for peaceful purposes," and "desire" to contribute to broad international co-operation in such exploration and use. Paragraph 8 merely recalls a resolution of the General Assembly, which in itself has no legally binding force. All that paragraph 8 does is to remind one that the

obligation undertaken in Article IV(1) of the Treaty has already been the subject of a General Assembly resolution exhorting all States to do likewise.

In law, it is well established that preambles to treaties do not normally contain provisions with binding obligations. They may at best serve as an aid in interpreting the substantive provisions of the Treaty. As the last paragraph of this Preamble notes, what the contracting States have "agreed on" is to be found only in the "following" articles.

In sum, contrary to a fairly prevalent misconception, there is nothing in the Preamble which says or even suggests that outer space can only be used for peaceful purposes.

Article I(1). The same can be said of Article I(1) of the Treaty, which provides:

> The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific developments, and shall be the province of all mankind.

Although framed in apparently obligatory language with the imperative "shall," the article is extremely general and unspecific, so much so that during the negotiations some delegates actually suggested that it should be transferred to the Preamble.[30] After all, what constitutes the benefit and interests of all countries is highly subjective. This provision, as a legally binding command, can easily lead to various kinds of legal sophism. Thus at the height of the Cold War in the fifties, the United States, under the first incarnation of its Open Skies policy[31] (a term which currently is used to mean various other things), justified its U-2 programme of overflying other countries as legitimate surveillance in defence of the free world.[32] Atmospheric nuclear tests at the time in the Pacific were also justified on the same basis. No doubt the Soviet Union would consider the defence and advance of Socialism or Communism as good for the soul of the world. So, of course, did the Inquisition about the work of the Inquisitor-General! Article I(1) as such can, therefore, hardly justify the view that it obliges the contracting Parties to the Space Treaty to use outer space solely for peaceful purposes, or solely for non-military purposes.[33] Moreover, the Declaration on International Co-operation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, adopted by the General Assembly of the United Nations on December 13, 1996, in Resolution 51/122, has now made it quite clear that the exploration and use of outer space for purposes such as those enumerated in Article I of the Space Treaty are matters of

free and voluntary co-operation between States "on an equitable and mutually acceptable basis." The pursuit of those purposes is, therefore, not a condition governing the contracting States' space activities.

Articles IX and XI. Articles IX and XI are the only articles, other than Article IV, where the word peaceful is found. They are worded as follows:

> Article IX: In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principles of co-operation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potential harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.
>
> Article XI: In order to promote international co-operation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the moon and other celestial bodies, agree to inform the Secretary-General of the United Nations as well as the public and international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, location and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.

Both provisions make it abundantly clear that they are merely promoting international co-operation in the "peaceful exploration and use of outer space." Like the Preamble and Article I, they carry no suggestion that outer space can be used only for peaceful or non-military purposes. The reference to "peaceful"

in Article IX is clearly intended to limit the benefit of consultation in case of potential interference with space activities to solely "the peaceful exploration and use of outer space." Similarly, Article XI intends merely to promote "co-operation in the peaceful exploration and use of outer space." Furthermore, in so doing, Article XI obviously is using the term "peaceful" to mean "non-military" and not "non-aggressive." Otherwise, the contracting Parties would carry a duty, however attenuated by the escape phrase "to the greatest extent feasible and practicable," "to inform the Secretary-General of the United Nations as well as the public and the international scientific community...of the nature, conduct, locations and results" of even their *military* space activities, in order to promote international co-operation in the "non-aggressive," including *military*, exploration and use of outer space. One can hardly ascribe to the extremely sophisticated negotiators such a degree of naivety! And why only "the public and the international scientific community"? If such co-operation were to include "non-aggressive" military exploration and use, surely government departments and the military community would be acutely interested and deserve to be expressly included.

In short, neither in the Preamble, nor in any provisions of the Space Treaty other than Article IV, do we find any restriction of outer space to exploration or use exclusively for peaceful purposes, or limiting the military use of outer space. While there is a desire to promote peaceful exploration and use, even the most extreme form of teleological interpretation cannot ferret out any shared resolve in these provisions to impose any restriction on the contracting States to use outer space solely for peaceful purposes, and not to use it for military purposes. We are consequently left with only Article IV in the whole Treaty which deals with the military use of outer space. Furthermore, to the extent to which the word "peaceful" is used in any of the text we have so far examined, the word "peaceful" is used to mean, and is clearly intended to mean, "non-military" and not "non-aggressive."

The Eisenhower Proposal 1960

Article IV of the Space Treaty can be traced back to a proposal made by President Dwight Eisenhower before the General Assembly of the United Nations on September 22, 1960. After recalling the recent example of the Antarctic Treaty and the missed opportunity of 1946 when the Soviet Union turned down the United States' Atoms for Peace Plan for placing atomic energy under international control, he proposed:

1. We agree that celestial bodies are not subject to national appropriation by any claims of sovereignty.

2. We agree that the nations of the world shall not engage in warlike activities on these bodies.

3. We agree, subject to appropriate verification, that no nation will put into orbit or station in outer space weapons of mass destruction. All launchings of space craft should be verified in advance by the United Nations.

4. We press forward with a programme of international co-operation for constructive peaceful uses of outer space under the United Nations. . . .[34]

Although the Paris Summit meeting between Eisenhower and Khrushchev planned for late May 1960 collapsed owing to the U-2 incident on the first of that month,[35] it is apparent how closely the 1967 Space Treaty was patterned on the Eisenhower proposal. The exception is, of course, on advance monitoring of all launchings of spacecraft. This was obviously due to Soviet opposition. All that the United Nations was at first able to do on this score was to adopt General Assembly Resolution 1721 (XVI) the following year on December 20, 1961, calling upon States launching objects into orbit or beyond to inform promptly the United Nations of such launchings, and asking the Secretary-General to establish a public register to record them. But such reporting was voluntary and the register very incomplete.[36] It was not until the conclusion of the 1975 Registration Convention[37] that a "mandatory"—to use the word in its Preamble—system of registering of objects launched into space was established by the contracting States. However, owing to Soviet opposition, the system is far from watertight. The Soviet Union persistently objected to having to make available advance information about launching. Thus, under the Convention, the duty to register a space object on the *national* register arises in reality only when an object has been launched (Article II), and nothing is said as to how soon after launching the registration should take place. Moreover, the duty is to notify the United Nations of such launchings "as soon as practicable" (Article IV), which can mean, and in some cases does mean, at no time. Finally, the Registration Convention, in addition to some general details and the basic orbital parameters to be provided to the United Nations, only requires the launching State to indicate the "general function of the space object" (Article IV). It is believed that many of the Soviet satellites described as scientific in notifications to the United Nations were in fact military.[38]

The objective of verifying all launchings has obviously not been achieved. A rather similar idea was that proposed by France in 1978. This was for an international satellite monitoring agency (ISMA) to verify arms control treaties, as well as to monitor crisis areas.[39] Even more ambiguous proposals were subsequently made by, among others, Italy,[40] Australia and Canada,[41] and in due course, in a complete volte-face, probably not uninfluenced by the United States Strategic Defense Initiative, by the Soviet Union itself, which in 1988 put forward the idea of a international body of inspectors to carry out on-site inspections to ensure that no object carrying weapons would be launched into space.[42] However, such ideas appear to be some distance away from fruition,[43] although, as things turn out, remote sensing satellites have become one of the most useful tools in the verification of arms limitation and disarmament agreements.[44]

But, returning to the Space Treaty, it can be seen that, for the rest, the basic ideas of the 1960 Eisenhower proposal have been largely agreed to by the Soviet Union and the other States and translated into binding obligations in the 1967 Space Treaty. Although, following item 1 of the Eisenhower proposal, the initial United States draft of a treaty put forward by the Johnson administration was limited to celestial bodies,[45] the United States was quick to agree with the overwhelming desire in COPUOS, including that of the Soviet Union, to enlarge the scope of the Treaty to the whole of outer space.[46] Item 1 thus finds expression in Article II of the Space Treaty. Article IV of the Treaty is clearly inspired by items 2 and 3.

As regards item 4, this is, of course, what the rest of the Space Treaty is all about: a programme of international co-operation for "constructive *peaceful* uses of outer space under the United Nations." Thus the phrase "international co-operation" or "co-operation" is expressly referred to in at least five of the thirteen substantive articles of the Treaty, including, as mentioned before, Articles I, IX and XI, whilst several of the remaining articles are concerned with mutual assistance in the event of accident, distress or emergency, such as Articles V and VIII.[47] In order further to drive home the point that "peaceful" can only mean "non-military" and not "non-aggressive" in the context of outer space, one merely has to reflect whether President Eisenhower, especially as he was harking back to the Antarctic Treaty and the Atoms for Peace Plan, could really and realistically have suggested that States should establish a programme under the United Nations for international co-operation in the non-aggressive uses of outer space, including military uses. At the same time, it may also be useful to recall that up to this point, we have come across no hint from the superpowers or the actual drafts to the Treaty that the whole of outer space should be reserved in law exclusively for peaceful purposes. The only provision on use exclusively for peaceful purposes is in Article IV(2), and this applies

solely to the moon and other celestial bodies, and definitely not to the space in between the celestial bodies, which we call the *outer void space*.

Article IV(2)

The Meaning of Peaceful in Sentence One. Insofar as Article IV(2) is concerned, there is little doubt that the word "peaceful" means "non-military" and not "non-aggressive." Article IV(2) provides:

> The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manœuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

1. *Textual and Semantic Prestidigitation.* A comparison of Article IV(2) with item 2 of the Eisenhower proposal may provide an additional clue as to the reason behind the switch in the meaning of the word "peaceful." It will be seen that the Eisenhower proposal, which was presumably the fruit of some inter-agency consultation in the Administration, intended merely to ban "warlike activities on these bodies," i.e., hostile or aggressive activities, but not necessarily all military activities. At that initial stage of space exploration, it is not inconceivable that one might perhaps have thought of a military telecommunications centre on the moon, or using it for the training of troops for space combat, or some other non-aggressive military activities. In the sixties, it was probably premature to rule out such possibilities and in the negotiations of the Space Treaty that could well have been the brief of the United States negotiators. It should further be remembered that at first the United States had proposed a treaty limited to celestial bodies. It was only after the negotiations had started that it agreed to extend the scope of the treaty to include also the outer void space. As to outer void space, there was no question of accepting complete demilitarisation.

They were then faced with a problem. There was the precedent set by Article I of the 1959 Antarctic Treaty which had been mentioned by President Eisenhower himself when introducing the United States proposal before the General Assembly, and which was fresh in everyone's mind. The negotiators might well have thought that to apply the Antarctic precedent 100 percent to all celestial bodies, including the moon, which would preclude any military

activities thereon, would already exceed their brief, but to also apply it to the outer void space would be completely out of the question. However, as mentioned earlier, there was immense clamour from all quarters for outer space as a whole to be reserved exclusively for peaceful use. To reject this demand outright would hardly have been politic.

This would explain why the United States negotiators decided to carry their newly invented semantic prestidigitation[48] into the Space Treaty, and at the same time to omit the clear and unambiguous introductory words in the second sentence of Article I of the Antarctic Treaty.[49] In so doing, they probably thought they had achieved the seemingly impossible. According to their own interpretation, while nominally acceding, if not totally, at least partially, to the popular demand for an outer space reserved exclusively for peaceful purposes, they would have banned only warlike (i.e., aggressive) activities on the moon and other celestial bodies in accordance with the original brief, but kept them completely free for non-warlike (i.e., not aggressive) military activities, save for a few specific prohibitions enumerated in the second sentence of Article IV(2). However, it is not believed that they have succeeded in doing so.

2. *The Antarctic Analogy and the Plain Meaning of the Word "Peaceful."* In the first place, it may be of interest to compare the wording of Article I of the Antarctic Treaty with Article IV(2) of the Space Treaty:

1959 Antarctic Treaty	1967 Space Treaty
ARTICLE I. 1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manœuvres, as well as the testing of any type of weapons. 2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purposes.	ARTICLE IV(2). The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manœuvres on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.

That the word "peaceful" in Article 1 of the Antarctic Treaty means "non-military" is clear. A comparison of the wording of Article IV(2) of the

Space Treaty with that of Article 1 of the Antarctic Treaty shows that it is the obvious intent of Article IV(2) of the Space Treaty to lay down basically the same kind of obligation in regard to celestial bodies as Article I of the Antarctic Treaty in respect of Antarctica, with the same kind of provisos, and with "peaceful" meaning definitely "non-military". The few departures here and there in the actual wording in no way detract from it. It is hoped that this paper will succeed in demonstrating that nothing in Article IV(2) or anywhere else in the Space Treaty even faintly suggests that "peaceful" means anything else, least of all "non-aggressive." Only the reverse is true. It is submitted that no amount of efforts on the part of the United States during the negotiations of the Space Treaty and ever since to attribute to the word "peaceful" in it the novel meaning of "non-aggressive" can be of any avail. The reason is simple. The United States having accepted the wording of Article IV(2) as it stands, must accept what it actually provides, whatever its own mental reservations.

Notwithstanding some doctrinal support of the United States' position,[50] one has only to consider the implications of the expression "peaceful" meaning "non-aggressive" and not "non-military." In the words of Professor Ivan Vlasic, "If 'peaceful' means 'non-aggressive,' then it follows logically—and absurdly—that all nuclear and chemical weapons are also 'peaceful,' as long as they are not used for aggressive purposes."[51] Further, if "non-aggressive" is truly the meaning of "peaceful," then does the specific provision in Article IV(2) that the moon and other celestial bodies shall be used by all States Parties "exclusively for non-aggressive purposes" mean that elsewhere, especially in outer void space, the contracting Parties are contrariwise not so restricted and may engage in activities which are partly or wholly for aggressive purposes? Would it be possible, for instance, to deliberately ram someone else's satellites in orbit, geostationary or otherwise, or fire on them? Since the Space Treaty cannot be interpreted to yield such absurd results, and since acts "for aggressive or aggression purposes" are under international law and the United Nations Charter, especially Article 2(4), permitted nowhere in the universe, the specific provision as found in the first sentence of Article IV(2) must consequently mean something different: it must mean that the moon and other celestial bodies shall be used exclusively for non-military purposes. Otherwise, there would be no point in having that first sentence. "Peaceful" in that first sentence means "non-military," whatever mental reservation the most powerful contracting Party to the Treaty might have had on the subject.

3. *Subsequent Practice.* However, Professor Vlasic, in reliance on Article 31(3) of the 1969 Vienna Convention on the Law of Treaties[52] on interpretation

based on the parties' subsequent practice, and the International Court of Justice's *North Sea Continental Shelf Cases* (1969)[53] regarding the role of the States "specially affected" in the formation of rules of general international law, seemed to have conceded that the United States usage of the word "peaceful" may now be its accepted meaning. He cited the enormous amount of military activities of both the United States and the Soviet Union in outer space, and remarked: "No State has ever *formally* protested the U.S. interpretation of the phrase 'peaceful uses' in the context of outer space activities."[54]

With respect, such a conclusion is unwarranted. Article 31(3)(b) of the Vienna Convention, which is itself based on the International Court of Justice's *Temple of Preah Vihear Case* (1962),[55] provides quite explicitly that interpretation can take into account "any subsequent practice in the application of the treaty which *establishes the agreement of the parties regarding its interpretation.*"[56] But here, it does not appear justified to mix what is expressly provided for in Article 31(3)(b) of the Vienna Convention with what was said in relation to the formation of general international law by the Court in the *North Sea Continental Shelf Cases* concerning parties "specially affected." In any case, in the present instance, there cannot be said to have been any subsequent practice regarding the interpretation of the phrase "exclusively for peaceful purposes" in Article IV(2) of the 1967 Space Treaty, and certainly no subsequent practice which "establishes the agreement of the parties regarding its interpretation."

As regards the point that there has been no protest, it needs to be pointed out that all the military activities of the United States and the Soviet Union are actually in outer void space, not on celestial bodies. Insofar as the moon and other celestial bodies are concerned, there has been no known or even suspected exploration or use of the moon or other celestial bodies for *military* purposes. There has, therefore, so far been no reason why any contracting State which believes in "peaceful" meaning "non-military" and not "non-aggressive" should lodge a protest. As a result, one can definitely not speak of any subsequent practice acquiescing in the United States' interpretation of the term "peaceful" based on the absence of any protest insofar as Article IV(2) is concerned, since States are certainly not required to monitor and correct other States' mistakes in their understanding of the law or legal malapropisms, as long as they do not put their misinterpretation into practice.

Insofar as the *outer void space* is concerned, where Professor Vlasic said all kinds of military space activities were widely known to be taking place without protest, there would be even less reason to protest. There would be grounds for protest only if any contracting State were to orbit or station weapons of mass destruction in outer space. Up to now, it does not appear that any party to the

Space Treaty, or any State at all, has done so or tried to do so. Outer void space has *not* been reserved for exclusively peaceful purposes, or, as for that matter, for any specific purposes, and all the military activities cited by Professor Vlasic as taking place there are perfectly legal under the Space Treaty.[57] Consequently, up to now, there has been neither reason nor ground for protest. One can, therefore, hardly base a case of subsequent practice in relation to the word "peaceful" in Article IV(2) on what has been going on in outer void space, to which the restriction to peaceful uses does not apply.

On the question of either practice or subsequent practice, as both the *Temple of Preah Vihear Case*[58] and the *Anglo-Norwegian Fisheries Case*[59] show, a State's legal rights can be adversely affected by the conduct of others only if it can be proved to have accepted, or to have over a period of time failed to protest when it had cause to protest against, a situation which actually impinged on its rights or interests. In our case, the fact that the contracting States to the Space Treaty have not protested the practice of one or two of them choosing to misuse the term peaceful to describe their perfectly lawful military activities in outer void space certainly cannot amount to what Article 31(3)(b) of the Vienna Convention on the Law of Treaties calls "agreement of the parties" regarding such a use of the term in relation to the treaty. Indeed, if every time some foreign State official commits a legal malapropism, one were required to protest, whether or not one's rights are affected, government offices would hardly have time to do anything else!

4. *Preparatory Work.* As a matter of fact, nor can one invoke Article 32 of the Vienna Convention, which allows the preparatory work of the Treaty to be used as a "supplementary means of interpretation," even though the United States negotiators of the Treaty appeared to have spent much effort in the corridors propagating the notion that "peaceful" meant "non-aggressive" and not "non-military." In the first place, this novel and bizarre use of a familiar word was never, as far as known, recorded officially as a reservation in any of the preparatory work concerned with the Treaty itself, and still less is there any record of the other negotiators acquiescing in such an extraordinary interpretation. There has been only hearsay, which certainly does not count. It is true that treaties can use any term in any meaning they wish to assign to it. The Moon Treaty,[60] for example, more or less proclaims in Article 1 that insofar as the treaty is concerned, when it says moon, it means all the celestial bodies within the solar system other than the earth. But there is no such provision in the 1967 Space Treaty. With a use of the term as upside down as the United States is propagating, the only way that it can be acceptable without ambiguity would be

for this usage to be defined explicitly in the Treaty, as the Moon Treaty has done with the word "moon." If there was an equivalent provision in the 1967 Treaty, then there would be no problem, but there is no such provision.

It is true that Article 32 of the Vienna Convention provides that resort can be made to the preparatory work of a treaty in interpretation, but the provision makes it clear that doing so is but a "*supplementary means*," one which may be used only:

> in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure, or
> (b) leads to a result which is manifestly absurd or unreasonable.

There is nothing ambiguous, obscure, manifestly absurd or unreasonable in interpreting "peaceful" to mean "non-military," which is the ordinary and normal meaning of the word. There is no need therefore to invoke preparatory work. On the contrary, to interpret "peaceful" as meaning "non-aggressive" is, to use the words of Article 32, "manifestly absurd and unreasonable."

It is unreasonable because such an interpretation renders the first sentence of Article IV(2) of the Space Treaty totally useless. First, States under current international law and the Charter of the United Nations are already bound not to engage in aggressive activities, and parties to the Space Treaty have already pledged themselves in Article III to abide by international law and the UN Charter in their exploration and use of outer space. Consequently, under this interpretation, the first sentence would be redundant and only the second sentence of Article IV(2) would be relevant. Instead of being merely exemplificative, as it should be, if the first sentence is controlling, as in Article I of the Antarctic Treaty, the second sentence would be the only material provision in Article IV(2). Its enumeration of the contracting Parties' obligations would be exhaustive. Sentences three and four would also become totally redundant; for there would be nothing in the first sentence even remotely to suggest that either military personnel or military equipment might not be used for "non-aggressive" exploration or use. Such an interpretation would be totally unreasonable.

But to interpret "peaceful" in Article IV(2) as "non-aggressive" would in fact be "manifestly absurd," for reasons already given by Professor Vlasic. In addition, if this is the correct interpretation, since Article IV(2) applies only to celestial bodies and not the outer void space, the absence of such a stipulation in, say, Article IV(1) or anywhere else in the Treaty immediately gives rise to the argument, as we have said, that contrariwise *aggressive* activities are permissible in outer void space! Otherwise, why an express provision providing that

the moon and other celestial bodies shall be used exclusively for non-aggressive purposes?

The provision of the Vienna Convention that is applicable in this case is, therefore, neither Article 31(3) on subsequent practice, nor Article 32 on preparatory work, but Article 1(1), which provides as follows:

> A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.[61]

In sum, the conclusion is inevitable that "peaceful" in the Space Treaty as a whole and in Article IV(2) in particular, means, has always meant and continues to mean "non-military," and not "non-aggressive," notwithstanding United States attempts to maintain otherwise.

Sentence Two of Article IV(2). If, as we have just shown, "peaceful" in the first sentence of Article IV(2) means "non-military," then it becomes obvious that the second sentence of Article IV(2), as in Article I of the Antarctic Treaty, is purely exemplificative. No activity whatsoever of a military nature is permitted on the moon and the other celestial bodies. As for the fact that only celestial bodies, but not the moon, are mentioned in the second sentence—this cannot possibly have any significance, since throughout the Treaty the moon has always been treated as one of the celestial bodies. Besides, the first sentence having explicitly referred to the moon and *other* celestial bodies, it would have been purely repetitive, in the next sentence intended to give examples of what may not be done on all celestial bodies, to again add an express reference to the moon.[62]

The Last Two Sentences of Article IV(2). The same applies to the omission of any qualification before "equipment and facility" in the last sentence. The last two sentences, following the example of the Antarctic Treaty, set out two permitted, or seeming, exceptions to the principle laid down in the first sentence. They are both of a similar character. Provided that the research or exploration is for peaceful purposes, what might otherwise be thought prohibited is expressly allowed, namely military personnel and equipment or facility. The omission of the qualification "military" insofar as equipment and facility are concerned is purely elliptical. Furthermore, the fact that, apart from the mention of weapon testing being forbidden, which falls clearly under the heading of a military activity, every item in the second and third sentences of Article IV(2) is

qualified by the adjective "military," namely, "*military* bases, installations and fortifications," "*military* manœuvres," and "*military* personnel" also confirms that what is meant in the last sentence is "*military* equipment or facility."

The existence of the last two sentences in Article IV(2) permitting the use of military personnel and equipment or facilities for respectively peaceful purposes and peaceful exploration[63] shows clearly that Article IV(2) of the Space Treaty, like Article I of the Antarctic Treaty, must have felt that such explicit exemptions were necessary, and this could only be because there is a blanket prohibition of *military* uses in the first sentence. Otherwise, since the research and exploration need be only for "non-aggressive purposes" and not "non-military," it goes without saying that any personnel and equipment can be used.

As to these last two sentences, the opinion is sometimes voiced that, since military personnel and equipment can be used, Article IV(2) cannot possibly intend to prohibit the use of celestial bodies for military purposes, and "peaceful" must mean non-aggressive, or at least something in between.[64] Such views ignore the precedent of the Antarctic Treaty, and what was so well explained by Edwin B. Parker, the umpire in the United States-German Mixed Claims Commission (1922) in *Opinion Construing the Phrase "Naval and Military Works or Materials" as Applied to Hull Losses and Also Dealing with Requisitioned Dutch Ships* (1924), which graphically shows that the test of whether an activity or equipment is of a military or non-military character can be an essentially functional one and not one of nominal status. He said in that case:

> The taxicabs privately owned and operated for profit in Paris during September, 1914, were in no sense military materials, but when these same taxicabs were requisitioned by the Military Governor of Paris and used to transport French reserves to meet and repel the oncoming German army, they became military materials, and so remained until redelivered to their owners. The automobile belonging to the United States assigned to its President and constitutional commander-in-chief of its Army for use in Washington is in no sense military materials. But had the same automobile been transported to the battlefront in France or Belgium and used by the same President, it would have become a part of the military equipment of the Army and as such impressed with a military character.[65]

Thus, in reverse, the fact that the first person in space was a Soviet military officer, and two of the three men who first flew to the moon were respectively a United States Air Force colonel and Air Force lieutenant colonel did not preclude their flights from being explorations of outer space for peaceful purposes. The essential criterion is the *purpose* of the activity.

This is not to deny that there are activities and uses which can serve both military and civilian purposes. From the standpoint of maintaining international peace and security, this is a serious problem which causes much concern,[66] but insofar as the law is concerned, Article IV(2) is quite explicit. The moon and other celestial bodies may only be used by the contracting States to the Treaty "*exclusively* for peaceful purposes"; in other words, no admixture of any military purpose. From this point of view, the law can only look at the present and actual purpose, whether overt or covert, but not speculative ulterior motives.

After all, as we have seen before, the whole space programme has tremendous military and strategical significance. To be realistic, the total demilitarisation of the moon and other celestial bodies is possible largely because they are, at least as things stand at the moment, militarily and strategically of no, or little, significance. As far as one is aware, none of the space Powers is contemplating using the moon or any other celestial bodies for military purposes. This tenacity of holding on to a misleading interpretation of the word "peaceful" in relation to the Space Treaty is difficult to understand, especially since the banning of military activities in the Treaty does not apply to outer void space, as a careful examination of Article IV(1) will show.

In any event, the last two sentences of Article IV(2) of the Space Treaty, far from modifying the ordinary meaning of the word "peaceful" in the article's first sentence, serve only to confirm that it means "non-military."

The 1979 Moon Treaty.[67] Insofar as the demilitarisation of the moon and the other celestial bodies is concerned, Article 3 of the Moon Treaty basically repeats Article IV of the Space Treaty, especially Article IV(2), except that the scope of the Moon Treaty is limited to the moon and only the celestial bodies within the solar system other than the earth, and, therefore, does not extend to celestial bodies outside the solar system. The specific mention of the moon in Article 3(4), which was omitted in the second sentence of Article IV(2) of the Space Treaty, for reasons which have been given above, in fact does not add anything of significance to the latter.[68] Apart from the express prohibition of placing weapons of mass destruction in a "trajectory to" the moon, the only difference lies in the Moon Treaty's Article 3(2), which specifically prohibits the threat or use of force or other hostile act. Since Article 2 of the Moon Treaty already binds the contracting States to observe international law and the Charter of the United Nations, and since Article 2(4) of the United Nations Charter already prohibits the threat or use of force, and no doubt also the launching of any weapon of mass destruction against any place in the universe without

lawful justification, the only real addition consists in the prohibition of "the threat or use of . . . other hostile act." The nature of these hostile acts remains, however, unclear, unless they refer to acts of individuals to which in principle international law is not applicable. But since, under both Article VI of the Space Treaty and Article 14(1) of the Moon Treaty, contracting States bear "international responsibility" for national activities in space carried on whether by themselves or by non-governmental entities, including individuals, and for assuring that they are carried out in conformity with the respective treaties, both of which provide for compliance with international law and the Charter of the United Nations, they would already have the responsibility of ensuring that the acts of such individuals comply with the States' international obligations.[69]

Article IV(1)

Article IV(1) of the Space Treaty provides:

> States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.

As we have seen, this provision in the Space Treaty is directly inspired by item 3 of the Eisenhower Proposal, except for the omission of the condition of verification. In addition, Article IV(1) also specifies that outer space includes celestial bodies.

In that connection, the omission of a specific mention of the moon, like the similar omission in the second sentence of Article IV(2), is again of no significance.[70] It will also readily be seen that Article IV(1) reproduces almost verbatim the relevant paragraph of General Assembly Resolution 1884 (XVIII) of 17 October 1963, when the long-winded formula of "outer space, including the moon and other celestial bodies" had not yet been developed, and as we have seen in the case of Resolution 1962 of the same year, the usage then was always to refer to "outer space *and* celestial bodies," without any specific mention of the moon. In any event, the moon is obviously a celestial body.

Resolution 1884 was, of course, itself based on a mutual understanding between the Soviet Union and the United States. From this point of view, the 1967 Treaty merely put into a multilateral treaty a mutual undertaking which the superpowers had reached between themselves, and to which the United Nations had already called on all States to subscribe. Consequently, it added

relatively little to the restriction on their freedom of action in outer space, especially that of the superpowers. All that Article IV(1) provides is that no "nuclear weapons or any other kinds of weapons of mass destruction" may be stationed in any manner anywhere in outer space, including the moon and other celestial bodies.

In other words, insofar as the immense void space in between the innumerable celestial bodies (the outer void space) is concerned, apart from the limitation on the stationing of weapons of mass destruction, the 1967 Treaty as a whole, including its Article IV(1), leaves the contracting States entirely free to use outer void space in any way they wish, including using it for military purposes, particularly in self-defence in accordance with the rules of international law and Article 51 of the United Nations Charter,[71] subject only to applicable rules of general international law, the United Nations Charter, in particular its Article 2(4), and any other treaty obligations States may have. In brief, *outer void space has NOT been reserved for use exclusively for peaceful (non-military) purposes*, contrary to a very prevalent view.[72]

From this point of view, Article 3(3) of the Moon Treaty adds nothing to Article IV(1) of the Space Treaty, which already prohibits not only the installation of nuclear weapons and other weapons of mass destruction "on celestial bodies," but also stationing them "in outer space in any other manner." The Moon Treaty has remedied the omission of a specific reference to the "moon" in the second sentence of Article IV(1), but as we have already pointed out, this omission is of no significance.[73] The only addition made by Article 3(3) of the Moon Treaty, if addition it really be, is the prohibition of placing of any space object carrying nuclear weapons or any other kinds of weapons of mass destruction in a "trajectory to or around the moon," again in the sense the word moon is used in the Moon Treaty. The essential condition of outer void space has not been affected.

Thus, insofar as Article IV of the 1967 Space Treaty is concerned, as well as, for that matter, the Treaty itself and the 1979 Moon Treaty, the contracting States remain free to deploy *IN OUTER VOID SPACE* any type of *military satellite*, including reconnaissance; communications, early warning, navigational, meteorological, geodetic and other satellites; construct *manned or unmanned military space stations*; carry out *military exercises and manœuvres*; station or use *any non-nuclear or non-mass destruction weapon* there, including anti-satellite weapons (*ASAT*) and ballistic missile defence systems (*BMD*); and last but not least, though this enumeration is by no means exhaustive, *send through or into outer void space any weapon*, whether or not nuclear[74] or of mass destruction, *against any target on earth or in outer space*[75]—of course, always subject to

applicable rules of international law and specific treaty obligations, including the United Nations Charter, particularly Articles 2(4) and 51.

With this immense freedom that the contracting States have in outer void space, it is hard to understand how, first, one can fail to see the difference between Article IV(1) and Article IV(2) of the Space Treaty, and maintain that "peaceful" in Article IV(2) is intended to mean no more than "non-aggressive," and second, how one can possibly claim or think that the whole of outer space is limited to use for peaceful purposes only, without reducing the word "peaceful" to meaninglessness.

The American arbitrator F. K. Nielsen, in his 1923 U.S.-Mexican General Claims Commission dissenting opinion in the *International Fisheries Co. Case* (1931), rightly pointed out:

> An inaccurate use of terminology may sometimes be of but little importance, and discussion of it may be merely a quibble. But accuracy of expression becomes important when it appears that inaccuracy is due to a confusion of thought in the understanding or application of proper rules or principles of law.[76]

Irrespective of whether or not Article IV of the Space Treaty has now become a matter of general international law, there is no doubt that the 1967 Space Treaty, as President Johnson said of it at the time, was "the most important arms control development since the limited test ban treaty of 1963."[77] It is consequently extremely important that there should be a clear understanding of what it means. The world has cause to be deeply concerned about the military use of space.[78] However, arms limitation and control in space cannot be divorced from the much wider political problems and extremely complex relations that exist between nations. Yet to begin with, one must be clear as to what one has at the moment, namely, Article IV of the Space Treaty, which is the obvious starting point. For the rest, the three indispensable conditions of successful international lawmaking are: 1) perceived need; 2) propitious political climate; and 3) due representation and consequential support of the dominant section of international society, including what the International Court of Justice calls the States "specially affected."[79] However, those who seek to secure the whole of outer space exclusively for peaceful exploration and use need first of all to ensure that the word "peaceful" is correctly interpreted. Otherwise, they could score an entirely empty victory and fall into the kind of meaningless self-deception typified by Article 88 of the United Nations Law of the Sea Convention (1982),[80] which tells us that the "high seas shall be reserved for peaceful purposes"!

Summary and Conclusions

1. The 1967 Space Treaty remains very close to the United States' policy on space first announced by President Eisenhower in 1960.

2. The original United States intention as regards the celestial bodies was that there should be no "warlike" activities on them, which may not mean that they should be completely demilitarised.

3. Popular opinion and a number of governments were clamouring for the whole of outer space, including all the celestial bodies, to be preserved for exclusively peaceful, i.e., non-military, exploration and use.

4. The two superpowers evidently did not wish to be seen as opposing this wish, while seeking ways of keeping all options open, in view of the obvious importance of outer space for military purposes. The Soviets, well used to concealing the true nature of practically everything they did, simply carried on with their practice of dissimulating all their military activities in space as non-military, and thus peaceful. The United States negotiators, instead, propagated the novel idea that "peaceful" meant merely "non-aggressive" and not "non-military." Every effort was made not to disturb the popular illusion that everyone was using outer space, including the moon and the other celestial bodies, only for peaceful purposes.

5. In the 1967 Space Treaty, the only article that concerns the military use of the whole of outer space is Article IV. Neither the Preamble nor Articles I(1), IX or XI of the Treaty affect the contracting States' freedom to use outer space for military purposes, though they all intend to promote its peaceful use. Although the Space Treaty makes much of international co-operation in the peaceful uses of outer space, there is no provision, contrary to a very prevalent misconception, anywhere in the entire Treaty which reserves the whole of outer space exclusively for peaceful use or exploration.

6. Only the moon and the other celestial bodies have been so reserved in Article IV(2), which does not apply to the void in between—what I have called "the outer void space." The first sentence of Article IV(2), in providing that the "moon and other celestial bodies shall be used . . . exclusively for peaceful purposes," has the effect of completely demilitarising all the celestial bodies.

7. Notwithstanding the stance taken by the United States, the word "peaceful" in the Treaty as a whole, and in its Article IV(2) in particular, by all the rules of treaty interpretation, retains its ordinary and well-established meaning of "non-military." To argue that it means "non-aggressive" leads to illogical, unreasonable, and even absurd consequences.

8. It is unwarranted to conclude from the fact that the United States has persistently interpreted the word "peaceful" in Article IV(2) as meaning "non-aggressive" and not "non-military," and that there has been "no protest" from other States, that the United States interpretation has consequently been confirmed by subsequent practice in accordance with Article 31(3) of the 1969 Vienna Convention on the Law of Treaties. The reason is simply that there has up to now not been any known occasion when the United States tried to implement its interpretation in regard to Article IV(2), by carrying on "non-aggressive" *military* activities on the moon or other celestial bodies. The result is that there has been no violation of Article IV(2) and, therefore, no need for any other State to protest.

9. The fact that the United States has long qualified its military activities in outer void space as peaceful without evoking any protest proves even less, inasmuch as such activities are, insofar as the Treaty is concerned, governed by its Article IV(1) and lawful under it. There is no reason or ground for other contracting States to protest simply because the United States wishes to give such activities a whimsical description.

10. Nor can one invoke the history of the Treaty to justify the United States interpretation under Article 32 of the Vienna Convention, inasmuch as not only has there been no express reservation on the part of the United States in this regard, but there has also been no recorded pronouncement on the part of the United States accompanying the presentation or adoption of this Article or of the Treaty to this effect that has been accepted by the other negotiating parties.

11. The applicable provision of the Vienna Convention is Article 31(1), which provides that the terms of a treaty are to be interpreted in good faith and given their "ordinary meaning." The ordinary meaning of "peaceful" is, of course, "non-military."

12. The first sentence of Article IV(2) being categoric, the second sentence is purely exemplificative.

13. The omission in the second sentence of Article IV(2) of a specific reference to the moon when dealing with celestial bodies is without significance, inasmuch as the previous sentence has already mentioned "the moon and *other* celestial bodies," thus clearly indicating that the moon is one of the celestial bodies. The omission is purely elliptical.

14. Similarly, the omission of any qualification as to the nature of the equipment and facility in the last sentence of Article IV(2) must be understood to mean *military* equipment and facility, in view of the reference to *military* personnel in the previous sentence. Such ellipses are perfectly normal.

15. The express authorisation of the use of military personnel, equipment and facilities for peaceful purposes, far from showing that the word "peaceful" in the first sentence does not mean "non-military," on the contrary conclusively demonstrates that it does mean "non-military," for sentences three and four in Article IV(2) constitute clear and express exemptions from the prohibition laid down in the first sentence. Otherwise, they would not be thought to be necessary, even if only out of an abundance of caution, since the exemptions are perfectly compatible with the spirit of the first sentence.

16. Article 3 of the Moon Treaty basically repeats Article IV of the Space Treaty insofar as the latter concerns the moon in the sense the word is used in the Moon Treaty, namely the moon and all the celestial bodies within the solar system other than the earth.

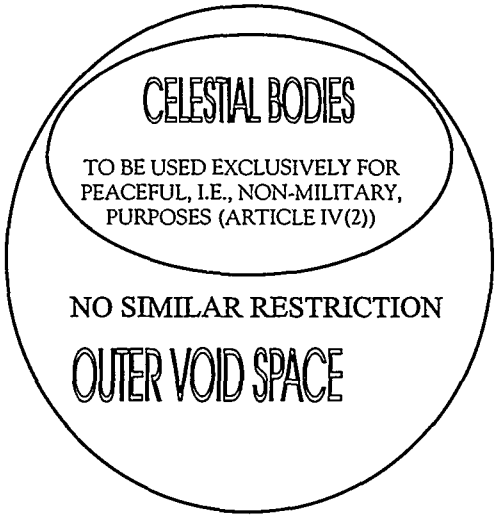
17. Insofar as the whole of outer void space in between the celestial bodies is concerned, the only provision in the Space Treaty concerning military use is to be found in its Article IV(1), in which the contracting States "undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, . . . or station such weapons in outer space in any other manner." It follows that, subject to the observance of applicable rules of international law and of the United Nations Charter, as well as relevant treaty obligations, contracting States may otherwise use outer void space for military purposes in any manner they wish, particularly in legitimate self-defence in accordance with the applicable rules of international law. Article IV(1) has definitely not excluded all military uses of outer void space.

18. In sum, the 1967 Space Treaty has by no means reserved the whole of outer space for exclusively peaceful exploration or use. Its Article IV(1) merely prohibits the stationing of weapons of mass destruction in the whole of outer space, a measure which the United States and the Soviet Union had agreed to between them even before the Treaty. Whether "peaceful" means "non-military" or "non-aggressive" consequently has no effect whatsoever on the contracting States' freedom to use the outer void space for military purposes in accordance with international law. Only Article IV(2) of the Treaty has completely demilitarised celestial bodies by saying that they shall be used solely for peaceful purposes. The legal position of the military use of outer space under the Space Treaty is summed up in Figure 4.

It results that only if the United States intends to use any of the celestial bodies for military purposes does it make sense to distort the meaning of "peaceful" from "non-military" to "non-aggressive." Since it is not believed that the United States has any such intention, and since the world has now become far more realistic regarding the use of outer space, the United States'

deliberate and continuing misinterpretation of "peaceful" in the Space Treaty to mean "non-aggressive" and not "non-military" appears to be wholly without purpose and behind the times, while gratuitously ruining a most useful and desirable word, and at the same time opening the door to possible mischief. It should be dropped forthwith.

Figure 4: The Military Use of Outer Space
Under the 1967 Space Treaty



OUTER SPACE

GENERAL RESTRICTIONS GOVERNING USE

1. International law and UN Charter applicable (Article III), which prohibit aggression and the use or threat of force (Charter, Article 2(4));

2. No stationing of "nuclear weapons or any other kinds of weapons of mass destruction" anywhere in outer space in any manner (Article IV(1)).

19. The world's fervent hope is not only that Article IV of the Space Treaty has by now acquired a sufficient *opinio generalis juris generalis* to qualify as a rule of general international law,[81] but also that States would, especially in the wake of the official celebration in 1997 of the end of the Cold War,[82] make rapid progress not merely in further limiting the military use of outer void space, but also in using outer space for the purpose of assisting limitations of armament or even general disarmament everywhere by providing an effective means of verification. In order to do so, one has first to be clear as to the meaning and scope of Article IV of the Space Treaty, which is the obvious starting point, and the precise meaning of the word "peaceful." There is definitely the need to ensure that real Peace prevails on earth, as well as in space. The political climate is propitious. All that is needed to satisfy the three indispensable conditions for successful international lawmaking to achieve this end is the political will of the leading nations of the world.

Notes

1. 402 UNTS 71; 12 UST 794; TIAS No. 4780. Signed at Washington on 1 December 1959; entered into force on 23 June 1961.

2. 14 November 1957.

3. Resolution 1348 (XII).

4. According to Professor Vlasic, one of the earliest uses of the term "peaceful" as an antonym for "aggressive" appeared in a 1959 report of the American Bar Association Committee on the Law of Outer Space [Proceedings of the American Bar Association, Section of International and Comparative Law, 1959, pp. 215–233, reproduced in Senate Committee on Aeronautical and Space Science, Legal Problems of Space Exploration: A Symposium, S. Doc. No. 26, 87th Cong., 1st Sess. (1961), pp. 571–594, at p. 576, citing M. MCDOUGAL, H. LASSWELL & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE (1963), at p. 397]. I. A. Vlasic, *Space Law and the Military Application of Space Technology*, in N. Jasentuliyana (ed.), PERSPECTIVES ON INTERNATIONAL LAW, London: Kluwer Law International (1995), pp. 385–410, at p. 391. It may be added that the learned authors of LAW AND PUBLIC ORDER IN SPACE not only endorsed this approach in their book, but also vigorously elaborated on the same theme (pp. 394–401), and their powerful voice must have greatly contributed to forming the official U.S. view on the subject. It may be of interest to mention that Professor McDougal was a member of the ABA Space Law Committee, whilst at the same time Professor J. C. Cooper, another Committee member, declined to sign the report. *Inter alia*, he expressed doubts, in a separate statement, about the report's invocation of the UN Charter (*Senate 1961 Symposium*, p. 592), which was used by the Committee to justify its line of argument on this topic (*ibid.*, pp. 574–577). Andrew Haley, another Committee member, while voting for the report, added a Comment endorsing John Cobb Cooper's statement and stating that he did "not believe that this is an appropriate document in which to discuss such philosophical and political concepts as 'non-aggressive military uses' of outer space" (*ibid.*, p. 593). Such concepts are, however, perfectly consonant with Professor McDougal's legal philosophy as exemplified, for instance, in his well-known article *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AMERICAN JOURNAL OF INTERNATIONAL LAW (1955), pp. 356–361. The end justifies all! But the dilemma faced by the ABA Committee of having to choose between on the one hand reserving outer space for use for exclusively peaceful purposes and on the other hand the needs of the United States and its allies to defend themselves could no doubt have been resolved by simply acknowledging openly that it was just not realistic in the circumstances to reserve the whole of outer space for use for exclusively peaceful purposes.

5. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 610 UNTS 205; 18 UST 2410; TIAS No. 6347. Opened for signature at London, Moscow, and Washington on 27 January 1967; entered into force on 10 October 1967.

6. For an analysis of the 1967 Space Treaty, see B. CHENG, STUDIES IN INTERNATIONAL SPACE LAW, Oxford: Clarendon Press (1997), Ch. 9, pp. 215–264.

7. Resolution 1962 (XVIII).

8. See B. Cheng, *The 1967 Space Treaty: Thirty Years On*, keynote address at the International Institute of Space Law's special dinner to celebrate the 30th anniversary of the Space Treaty, 40 SPACE LAW COLLOQUIUM (1997), pp. XVII–XXIX, s. III.1: Filing in Lacunae, e.g., "Outer Void Space," at p. XIX. See further B. Cheng, *Outer Void Space: The Reasons for This Neologism in Space Law*, AUSTRALIAN INTERNATIONAL LAW JOURNAL (1999), pp. 1–8.

9. *Cf.* G. SCHWARZENBERGER, POWER POLITICS, 3rd ed., London: Stevens (1964), Part II: Power Politics in Disguise, pp. 249–515.

10. See, e.g., CHENG, *op. cit.* in note 6 above, Ch. 19: Definitional Issues in Space Law: The "Peaceful Use" of Outer Space, pp. 513–522. See also note 4 above.

11. See CHENG, *op. cit.* in note 6 above, Ch. 4: International Co-operation and Control: From Atoms to Space, pp. 52–69.

12. The text of Art I is reproduced below.

13. UN Doc. A/C.1/PV.1289 (3.12.62), p. 13.

14. UN Doc. A/AC.105/PV.3 (20.3.62), p. 63.

15. As to the expectations at the time, even before the actual launch of Sputnik I, see CHENG, *op. cit.* in note 6 above, Ch. 2: International Law and High Altitude Flights, pp. 14–51, notes 12 and 13 and text thereto, at p. 17.

16. See *ibid.*, Ch. 1: In the Beginning: The International Geophysical Year, pp. 3–13.

17. See *ibid.*, Ch. 6: The United Nations and Outer Space, pp. 91–124, text to note 134, at p. 121.

18. See *ibid.*, Ch. 6, s. VI: Demilitarisation and Disarmament, at pp. 119–124.

19. *Cf.* UN Doc. A/AC/105/C.2/SR.65 (22.7.66), pp. 9–10; *ibid.*, /SR.66 (23.7.66), pp. 6–7 (USSR).

20. *Cf.*, e.g., Soviet behaviour in the 1960 RB-47 incident (see CHENG, *op. cit.* in note 6 above, Ch. 6, s. V.B: Peripheral Reconnaissance, at pp. 107–119), and the 1983 Korean Airlines incident (see B. Cheng, *The Destruction of KAL Flight KE007 and Article 3bis of the Chicago Convention*, in J. W. E. Storm van s Gravesande and A. van der Veen Vonk (eds.), AIR WORTHY (Liber Amicorum I. H. Ph. Diederiks-Verschoor), Daventer: Kluwer (1985), p. 47. And see text to note 38 below.

21. UN Doc. A/C.1/L.219 (16.3.58).

22. See *op. cit.* in note 6 above, Ch. 6 : The Extraterrestrial Application of International Law, note 39 and text thereto, at p. 83.

23. A number of other treaties, bilateral or multilateral, concluded or proposed, affect the military use of outer space, which time and space do not permit us to enter into here. Mention may be made of the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere in Outer Space and Under Water (480 UNTS 43); the 1972 US-USSR agreement on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) [11 ILM (1972) 784]; the 1972 US/USSR Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (SALT I Agreement) [11 ILM (1972) 791]; 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques [16 ILM (1977) 88]; 1979 US/USSR Treaty on the Limitation of Strategic Offensive Arms (SALT II Treaty) [18 ILM (1979) 1112]; the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies(Moon Treaty) [18 ILM (1979) 1434; 1363 UNTS 3]; the 1981 Soviet proposal for a Treaty on the Prohibition of the Stationing of Weapons of Any Kind in Outer Space [UN Doc. A/36/192 (22.8.81)]; the 1983 Soviet proposal for a Treaty on the Prohibition of the Use of Force in Outer Space and from Space against the Earth [UN Doc. A/38/194 (20.8.83)]. See B. Jasani, *Outer Space: Militarization Outpaces Legal Controls*, in N. Jasentuliyana (ed.), MAINTAINING OUTER SPACE FOR PEACEFUL USES, Japan: The UN University (1984), pp. 221–252, Table 2, at pp. 234–237, where some of the key provisions of these treaties are cited.

24. On various other terms and aspects of the 1967 Space Treaty, particularly from the standpoint of interpretation and definition, *cf.* S. Gorove, *Article IV of the 1967 Outer Space Treaty and Some Alternatives for Further Arms Control*, in Jasentuliyana (ed.), *op. cit.* in note 23 above, pp. 77–89.

25. *Cf.* bilateral agreement reached on 8 June 1962 between the Academy of Sciences of the USSR and the National Aeronautics and Space Administration (NASA) of the US on co-operation in satellite meteorology, world geomagnetic survey and satellite telecommunications, following an exchange of views between Khrushchev and Kennedy, and subsequently communicated by the two governments to the United Nations, UN Doc: A/C.1/880 (5.12.62); reprinted 2 ILM (1963) 195, with a note on its having been confirmed by both governments, and its coming into effect. C. W. JENKS, SPACE LAW, London: Stevens (1965), prints the First Memorandum of Understanding to implement the above agreement among its appendices, at p. 382.

26. 480 UNTS 43; 14 UST 1313; TIAS No. 5433; 2 ILM (1963) 883.

27. Art. 1, emphasis added.

28. It may be worthwhile pointing out that the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space [GA Res. 1962 (XVIII)] of 13 December 1963, the year before, which represents an earlier agreement between the superpowers and which is the forerunner of the 1967 Treaty, does not include a principle similar to Article IV of the Treaty.

29. Emphasis added.

30. Italy, UN Doc. A/AC.105/C.2/SR.64 (21.7.66), p. 4–5; France, *ibid.*, p. 6.

31. *Cf. op. cit.* in note 6 above, Ch. 2: International Law and High Altitude Flights, note 11, at p. 17, and text thereto; Ch. 6: The United Nations and Outer Space, notes 75 and 89, at pp. 103 and 106, and text thereto; V. S. Vereshchetin, *'Open Skies': The Metamorphosis of a Concept*, in T. L. Masson-Zwaan and P. M. J. Mendes de Leon (eds.), AIR AND SPACE LAW: DE LEGE FERENDA (Liber Amicorum Henri A. Wassenbergh), Dordrecht: Martinus Nijhoff (1992), pp. 283–290. It should be added that the term is now also used in air law to describe a liberal policy in international air transport of opening a country's airspace to foreign airlines. See H. Wassenbergh, *'Open Skies'/ 'Open Markets': The Limits to Competition*, in Chia-Jui Cheng (ed.), THE USE OF AIRSPACE AND OUTER SPACE FOR ALL MANKIND IN THE 21ST CENTURY, The Hague: Kluwer (1995), pp.195–204.

32. N. M. Matte in *Military Uses of Outer Space and the 1967 Outer Space Treaty*, in Storm van s Gravesande and van der Veen Vonk (eds.), *op. cit.* in note 13 above, pp. 117–134, using a more recent example, likewise points out that, while reconnaissance satellites may be good for their owner-States, they are not necessarily good for the benefit and in the interests of all countries (at p. 125).

33. See, e.g., in agreement, D. Goedhuis, *Legal Implications of the Present and Projected Military Uses of Outer Space*, in Jasentuliyana (ed.), *op. cit.* in note 23 above, pp. 253–269, at pp. 260–261; *contra*, Matte, *loc. cit.* in note 32 above, at p. 128. On Art. I of the Space Treaty, see further CHENG, *op. cit.* in note 6 above, Ch. 9: The 1967 Space Treaty, s.V.E.: Exploration and Use for the Benefit of All Countries, at pp. 234–236.

34. Eisenhower's speech as put out by U.S. Information Service in London, Official Text (22.9.60), pp. 5–6. Text differs slightly from the Official Records of the General Assembly, GA(XV) A/PV.868 (22.9.60), p. 45, at p. 48, which was based on a transcript of the recording of the speech. In reply to an inquiry from the writer, the State Department confirmed the accuracy of the text quoted above. See further CHENG, *op. cit.* in note 6 above, Ch. 6: The United Nations and Outer Space, note 142 and text thereto, at p. 123.

35. See CHENG, *op. cit.* in note 6 above, Ch. 6, s. V.A.: Penetrative Reconnaissance, at pp. 104–107.

36. See C. S. Sheldon II and B. M. DeVoe, *United Nations Registry of Space Vehicles*, 13 SPACE LAW COLLOQUIUM (1970), pp. 127–141.

37. Convention on Registration of Objects Launched into Outer Space, 14 January 1975, 1023 UNTS 15; 28 UST 695; TIAS No. 8480. Opened for signature on 29 March 1972; entered into force on 1 September 1972.

38. *Cf.* UN Secretary-General, Report on Application of the Convention on Registration of Objects Launched into Outer Space. UN Doc. A/AC.105/382 (2.3.87); A. J. Young, *A Decennial Review of the Registration Convention*, 9 ANNALS OF AIR AND SPACE LAW (1986), pp. 287–308.

39. UN Doc. A/S-10.1/7 (May-June 1978).

40. CD Doc. CD/9 (26.3.79); CD/PV.274 (19.7.84), p. 5–8; CD/540, p. 171.

41. CD Doc. CD/OS/WP.25 (25.8.88).

42. CD Doc. CD/817, CD/OS/WP.19 (17.3.88). See I. I. Kuskuvelis, *The Importance of Structures in the Future of the Military Space Regime*, in E. J. Palyga (ed.), INTERNATIONAL SPACE LAW MISCELLANEA (Liber Amicorum Andrzej Górbiel), Warsaw: Instytut Humanistyczny (1955), p. 115, at pp. 116–117.

43. *Cf.* Bhupendra Jasani (ed.), PEACEFUL AND NON-PEACEFUL USES OF SPACE, New York: Taylor & Francis (1991), pp. 14–16; *idem*, *Outer Space: Militarisation Outpaces Legal Controls*, *loc. cit.* in note 23 above, at pp. 244–250.

44. *Cf.* CHENG, *op. cit.* in note 6 above, Ch. 22: Remote Sensing, s. VII: Capability and Uses, at pp. 584–589; S. Sur (ed.), VERIFICATION OF CURRENT DISARMAMENT AND ARMS LIMITATION AGREEMENTS: WAYS, MEANS AND PRACTICES, Aldershot: Dartmouth for UNIDIR (1991); Y. Hashimoto, *Verification Systems from Outer Space—Revival of International Satellite Monitoring Agency*, 37 SPACE LAW COLLOQUIUM (1994), p. 230; W. von Kries, *Satellite Verification and European Arms Control*, 33 *ibid.* (1990), p. 375.

45. UN Doc. A/AC.105/32, and Corr. 1 (16.6.66).

46. See further CHENG, *op. cit.* in note 6 above, Ch. 9, s. III.B: The 1967 Space Treaty, at pp. 221–223.

47. See *ibid.*, Ch. 9, s. VII: International Co-operation and Mutual Assistance, at pp. 252–261.

48. See Senator Gore's speech referred to in note 13 above. The point was apparently hammered home in informal discussions without it being officially recorded in any of the summary records or procès-verbaux. See, e.g., the Indian representative to the First Committee, who, when criticising the limited scope of Article IV, went on to say, "the use of military personnel and any necessary equipment or facility was expressly permitted, and where it was emphatically asserted that 'peaceful' meant not 'non-military' but merely 'non-aggressive.' " UN Doc. A/C.1/SR.1493 (17.12.66), p. 436 (9).

49. Article IV(1) was based largely on Article 9 of the U.S. first draft transmitted to the Chairman of COPUOS on 16 June 1966, UN Doc. A/AC.105/32, and Corr. 1. A comparative text of Article 1 of the Antarctic Treaty and Article IV(2) of the Space Treaty is to be found below. It would, however, be only fair to mention that, for reasons which were not fully apparent, the Soviet Union was also reluctant to follow the example of the Antarctic Treaty, UN Doc. A/AC.105/C.2/SR.65(22.7.66), p. 11.

50. *Cf.*, e.g., E. R. Finch, *Outer Space for "Peaceful Purposes,"* 54 AMERICAN BAR ASSOCIATION JOURNAL (1968), p. 365; A. Meyer, *Interpretation of the Term "Peaceful" in the Light of the Space Treaty*, 11 SPACE LAW COLLOQUIUM (1968), p. 105; M. Menter, *Peaceful Uses of Outer Space and National Security*, 17(3) INTERNATIONAL LAWYER (1983), p. 381; L. Haeck, *Le droit de la guerre spatiale*, 16 ANNALS OF AIR AND SPACE LAW (1991), p. 307, at p. 309.

51. *The Legal Aspects of Peaceful and Non-Peaceful Uses of Outer Space*, in Jasani, *op. cit.* in note 43 above, p. 37, at pp. 44–45.

52. 1155 UNTS 331; 8 ILM (1969), 679.

53. ICJ Rep. 1969, p. 3, para. 73.

54. *Loc. cit.* in note 51 above, p. 45. Original italics.

55. ICJ Rep. 1962, p. 6.

56. Emphasis added.

57. See "Article IV(1)" below.

58. ICJ Rep. 1962, p. 6.

59. ICJ Rep. 1951, p. 116.

60. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 18 December 1978, New York, 1363 UNTS 3; 18 ILM (1979) 1434. Opened for signature on 18 December 1979; entered into force on 11 July 1984. See CHENG, *op. cit.* in note 6 above, Ch. 12: The Moon Treaty, at pp. 357–380.

61. Emphasis added.

62. *Cf. contra* N. Jasentuliyana, *The Moon Treaty*, in Jasentuliyana (ed.), *op. cit.* in note 23 above, pp. 121–139, at p. 130, who seems to believe that the second sentence is not applicable to the moon, and this omission is only remedied by Article 3(4) of the 1979 Moon Treaty. Such an interpretation, if combined with the U.S. interpretation of "peaceful," would deprive Article IV(2) of any practical effect for probably many decades to come, if not forever, since the military use of celestial bodies other than the terrestrial moon is at present, to say the least, somewhat speculative.

63. There is a rather subtle difference between the third and fourth sentences in that military personnel can be used for "any . . . peaceful purposes," military equipment and facilities can only be used "if necessary for peaceful exploration." This makes sense inasmuch as military equipment and facilities, unless "necessary for peaceful exploration," are likely to be capable of military use. The military risks presented by military personnel without military equipment or facilities would be much less.

64. *Cf.* Gorove, *loc. cit.* in note above, p. 77, at pp. 81–2; N. Jasentuliyana, *The Moon Treaty*, *loc. cit.* in note 62 above, at pp. 128–129.

65. *Decisions and Opinions*, p. 75, at p. 97.

66. See, e.g., S. E. DOYLE, CIVIL SPACE SYSTEMS: IMPLICATIONS FOR INTERNATIONAL SECURITY, Aldershot: Dartmouth for UNIDIR (1994).

67. See CHENG, *op. cit.* in note 6 above, Ch. 12: The Moon Treaty, at pp. 357–380.

68. See notes 62 above and 75 below with accompanying text. See also Haeck, *loc. cit.* in note 50 above, by no means the only writer who appears to be rather unclear on the subject (p. 321), and on the distinction that ought to be made, insofar as Article IV is concerned, between (i) outer space in the sense used by the Space Treaty, which includes the moon and the other celestial bodies, (ii) the outer void space, and (iii) celestial bodies (at p. 315).

69. See further CHENG, *op. cit.* in note 6 above, Ch. 12: The Moon Treaty, s. IV.C: Non-militarisation, at pp. 367–368, and Ch. 24: International Responsibility and Liability for National Activities in Outer Space, at pp. 621–640; B. Cheng, *Article VI of the 1967 Space Treaty Revisited: "International Responsibility," "National Activities," and "The Appropriate State,"* 26 JOURNAL OF SPACE LAW (1998), pp. 7–32.

70. *Cf. contra* Jasentuliyana, *loc. cit.* in note 64 above, at p. 130.

71. Some politicians and writers appear to have a mistaken notion of a State's right of self-defence, treating it as authorising whatever is desirable in the interest of national security. The international law right of self-defence is a legal concept derived from or at least comparable to the canon law notion of *defensio legitima*, legitimate (self-) defence. It is subject to strict legal rules and conditions. On the position in international law, see B. CHENG, GENERAL PRINCIPLES

OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Cambridge: Grotius (1987), Ch. 2, s. B: Self-Defence, pp. 77–97.

72. *Cf.*, among numerous others, Menter and Finch, *loc. cit.* in note 50 above, and Jasani *loc. cit.* in note 23 above, at p. 244.

73. *Cf. contra* Jasentuliyana, *loc. cit.* in note 64 above, at p. 130, who believes that Article 3(3) of the Moon Treaty has added "vast new areas that were not specifically covered by the outer space treaty," seemingly referring to the applicability of the moon treaty to all the celestial bodies within the solar system under its Article 1(2). However, this is difficult to understand because Article IV(1) of the Space Treaty applies to all celestial bodies in the whole universe, which would include all celestial bodies in the solar system. The prohibition of the "use" of weapons of mass destruction "on or in the moon" mentioned in Article 3(3) of the Moon Treaty and not in Article IV(1) of the Space Treaty is covered by Article IV(2) of the Space Treaty, first sentence. See also notes 62 above and 75 below.

74. On the use of nuclear weapons, see the rather hesitant tone of the International Court of Justice's Advisory Opinion in *Legality of the Use of Nuclear Weapons*, ICJ Rep. 1996, p. 66.

75. Insofar as outer void space is concerned, for parties which are parties to the Partial Test Ban Treaty (see note 26 above and text thereto), the Treaty may be applicable. It may, however, possibly be argued that the Treaty applies only to the *test* of nuclear weapons and devices, but not to their use. The Treaty may further arguably be said to apply to not only outer void space, but also celestial bodies, even though, as previously mentioned, the usage at the time was to speak of outer space *and* celestial bodies. However, Article IV(2) of the Space Treaty and Article 3 of the Moon Treaty are obviously applicable. Article 3(3) of the Moon Treaty, by forbidding the placing of space objects carrying nuclear weapons or any other kinds of weapons of mass destruction in a "trajectory to . . . the moon," may possibly prevent the use of such weapons against targets on the moon in the sense the word moon is used in the Moon Treaty. Moreover, the prohibition of "any threat or use of force" on the moon may also prevent the *use* of any weapon on the moon, even though the specific prohibition of "the testing of any type of weapon" in Article 3(4) of the Moon Treaty, and Article IV(2) of the Space Treaty may give rise to the same argument as that just mentioned regarding the Partial Test Ban Treaty, that they apply only to testing, but not actual use. Finally, the question remains as to whether the reservation of celestial bodies for use for exclusively peaceful purposes in both treaties means that no weapon whatsoever may be used against any target on celestial bodies from either the earth or outer void space, however evil, illegal, and even criminal the target may be, although in such a case it can be argued that the assault would not constitute a "use" of the celestial body, whilst the target most probably would. However, under neither treaty may such an assault be mounted from another celestial body other than the earth. See further CHENG, *op. cit.* in note 6 above, Ch. 20: The Military Use of Outer Space and International Law, s. III.B(viii), at pp. 529–532. See also, e.g., Jasani, *loc. cit.* in note 23 above, at pp. 222–244, and I. V. Vlasic, *Space Law and the Military Applications of Space Technology*, *loc. cit.* in note 4 above, on some of the current military uses of outer void space. As mentioned by Professor Vlasic, the United States in the 1991 Gulf War had at its disposal seven imaging satellites, making an average of 12 passes over the theatre of operations each day, between 15 and 20 signals intelligence satellites, intercepting radio communications of the Iraqis, three defence weather satellites, at least four military communications satellites and up to 16 "Navstar" Global Positioning System (GPS) satellites, assisted by images acquired by the French SPOT and U.S. Landsat civilian remote sensing satellites which were used to update maps for the operational forces (at p. 388).

76. Opinions of Commissioners, October 1930 to July 1931, p. 207, at pp. 265–266.

77. 55 DEPT. OF STATE BULL. (1966), p. 952; statement released on 8 December 1966, when agreement was actually reached between the major space Powers.

78. *Cf.*, e.g., V. Kopal, *Concerns Expressed in the United Nations over the Military Uses of Outer Space*, in Jasentuliyana, (ed.), *op. cit.* in note 23 above, p. 59, and several other papers in the same volume. See also José Monserrat Filho, *Total Militarization of Space and Space Law: The Future of the Article IV of the '67 Outer Space Treaty*, 40 SPACE LAW COLLOQUIUM (1997), pp. 356–369.

79. See CHENG, *op. cit.* in note 6 above, Epilogue, s. IV: Conditions Governing International Rule-Making, pp. 671–697.

80. UN Publ. Sales No. E.83.V.5.

81. On the formation of rules of general international law, see B. Cheng, *Custom: The Future of General State Practice In a Divided World*, in R. St. J. MacDonald and D. M. Johnston (eds.), THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW, The Hague: Martinus Nijhoff (1983), pp. 513–554. N.B.: pp. 545 and 546 are in the wrong order and have been wrongly paginated.

82. See THE TIMES LONDON (28 May 1997), p. 1, col. 1: *Russia and NATO Bury the Cold War*, reporting the signing by NATO and Russia at Paris on 27 May 1997 of the Founding Act on Mutual Relations, Co-operation and Security, and the surprise promise by President Yeltsin afterwards that Russian warheads would not be targeted at the signatories to the Founding Act. For text of the Founding Act, see 36 ILM (1997) 1006.